# MEMORANDUM State of Alaska

TO: Distribution List

DATE: July 26, 1985

FILE NO:

TELEPHONE NO: 276-3550

FROM: Michael J. Frank
Assistant Attorney General

SUBJECT: R.S. § 2477s on protracted "section lines"

Attached is the long awaited draft opinion on R.S. § 2477's interplay with AS 19.10.010. Draft means simply that it is subject to change and has not yet been sanctioned by our office.

Your comments and criticisms about this draft will be appreciated.

MJF:amh

cc: Mark Hickey, DOTPF
✓Clyde Duran, DTS
Tom Hawkins, DLWM
Neil Johannsen, DPOR
Tom Koester, AGO-Juneau
John McDonagh, AGO-Fairbanks

DRAFT

X

July 24, 1985

The Honorable Esther Wunnicke
Commissioner
Department of Natural Resources
Pouch M
Juneau, Alaska 99811

Re: R.S. § 2477 rights-of-way
Our File No.: 166-008-84

Dear Commissioner Wunnicke:

By memoranda dated April 28, July 6, and October 24, 1983, you have asked us for an opinion on various questions concerning R.S. § 2477 and AS 19.10.010 1/ rights-of-way on

---

1/ R.S. § 2477 is a commonly accepted acronym for Revised Statutes Sec. 2477. It refers to § 8 of ch. 262 of the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 932 (1976) (repealed in the Federal Land Policy Management Act, Pub. L. 94-579, Title VII, § 706a, October 21, 1976, hereafter "FLPMA"). Section 8 of the Act of July 26, 1866 reads: "The right-of-way for the construction of highways over public lands not reserved for public uses is hereby granted." The Act of July 26, 1866 was actually entitled "An Act Granting The Right-Of-Way To Ditch And Canal Owners Over The Public Lands, And For Other Purposes," but it is commonly known as the "mining law of 1866." Section 8, or R.S. § 2477, is sometimes also referred to as the "highway act of 1866" in court opinions. When the federal laws were reorganized in 1878 pursuant to congressional direction, the reviser of the statutes redesignated section 8 of the Act of July 26, 1866 as section 2477 of the Revised Statutes.

The other pertinent statute we will refer to throughout this opinion is AS 19.10.010, originally passed as 1923 SLA ch. 19, and which after amendments in 1951 and 1953 now reads:

(Footnote Continued)

"section lines" established by mathematical protractions in lieu of actual on-the-ground survey. We have distilled from your memoranda three main questions:

(1) Does AS 19.10.010 have the effect of creating an R.S. § 2477 right-of-way on mathematically protracted, i.e., unsurveyed, "section lines?" 2/

Our answer to this question is "probably not," because we deem it unlikely that a court would find that R.S. § 2477

---

(Footnote Continued)

> A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey.

2/ We put the phrase "section lines" in quotes because federal case law explored below concludes that sections do not exist until actually surveyed on the ground, and thus arguably it is incorrect to speak of protracted section lines. We note that current Department of Natural Resource policy, as codified in the Policy and Procedure Manual, ch. 5122, section 2, § 3.6 at 13 (November 4, 1981) requires that "Before a section line easement can be used, the location of the section line must be surveyed." See also the easement and rights-of-way regulations at 11 AAC 53.300 et seq., and general public land use regulations at 11 AAC 96.

rights-of-way were created on protracted "section lines" merely through the passage of AS 19.10.010. Our answer is tentative because of the somewhat muddled legal history 3/ of R.S. § 2477, and is, therefore, at best a prediction of what a court, particularly a federal court, might decide.

(2) What effect does AS 19.10.010 have on federally or privately owned lands, as opposed to state owned lands?

The answer to this question depends in significant part on the history of the land involved. We will explore the principles that guide inquiries into this topic in some detail below.

(3) How may the general public use and develop dedicated section line rights-of-way on state owned land, particularly state owned land that has been legislatively withdrawn from the public domain under the Alaska Constitution, art. VIII, section 7 for park purposes?

---

3 / The 1866 Congress left the meaning of R.S. § 2477 somewhat of a mystery by saying very little about it in considering the 1866 act of which it was a part. See generally The Congressional Globe, Vol. 36, 39th Cong., 1st Sess., part iv., 3225-3228 (1866).

The answer to this question depends in part on the manner in which the land is administratively classified, and in part on the legislative mandate for the land. Again, we will explore the applicable law in greater detail below.

In providing answers to the three principal questions, other ones arise which have no clear answers. Rather than list each, we believe it will be more helpful to discuss subsidiary questions in the overall context of the three principal ones, and to do so in a general exploration of the history and application of R.S. § 2477.

Before beginning our discussion in greater depth, it would be helpful to first note that although we have doubts about the existence of AS 19.10.010 created R.S. § 2477 rights-of-way on protracted "section lines", we have no doubts about the department's authority to expressly reserve rights-of-way when it conveys lands out of state ownership, whether these rights-of-way are reserved on surveyed or protracted section lines. In Wessells v. State Department of Highways, 562 P.2d 1042, 1046 n.6 (Alaska 1977), the Alaska Supreme Court found that the state had "clear authority" to reserve easements when it makes land conveyances under various sections of AS 38.05. The same is true under AS 38.04.050 -- 38.04.058. See Anderson v. Edwards, 625 P.2d

282, 284 n.1 (Alaska 1981). Neither AS 38.04 nor AS 38.05 contains a restriction on the type or location of an easement the state might create on state owned land, including that which is conveyed out of state ownership. It is well settled in other states as well that a government in conveying its land may reserve "floating easements" (i.e., not surveyed on the ground until after the conveyance occurs). See, e.g., City of Phoenix v. Kennedy, 675 P.2d 293 (Ariz. App. 1983). Our conclusions with respect to R.S. § 2477 and its interface with AS 19.10.010 should not, therefore, be construed as imposing any limitations on the exercise of state power to expressly reserve easements under AS 38.04 or AS 38.05 (or implementing regulations at 11 AAC 53.300 et seq.) in land agreements the state participates in or to designate right-of-way corridors on land retained in state ownership. Rather, we mean only to suggest that it may be dangerous to assume that the mere existence of AS 19.10.010 has the effect of reserving rights-of-way on section lines which are surveyed on the ground after land leaves state ownership. This danger can easily be avoided, however, through the use of express reservation language in patents, interim leases, etc.

Secondly, although AS 19.10.010 has been interpreted as an "acceptance" of the R.S. § 2477 grant by Alaska courts, AS 19.10.010 can also be seen as an independent right-of-way

dedication on the surveyed section line of all land owned by or acquired from the state. R.S. § 2477's repeal, in other words, leaves AS 19.10.010 dedicatory impact alive. AS 19.10.010 thus reserves such rights-of-way without regard to its interplay with the now repealed R.S. § 2477, at least with respect to land owned by or acquired from the state. Indeed, had R.S. § 2477 never applied to Alaska, AS 19.10.010 would still be a valid right-of-way dedication for such state lands. With respect to language added to AS 19.10.010 in 1953 4/ dedicating a tract four rods (66 feet) wide between all other sections in the state, the effect of AS 19.10.010 is more problematical if the "in the Territory (state)" language was intended to include all federal lands and private lands received from the federal government without

---

4 / In 1949 AS 19.10.010 was, apparently by accident, repealed when Alaska's laws were codified. See § 1, ch. 1 SLA 1949. It was re-enacted in 1951 (ch. 123 SLA 1951), but amended so that the "owned by ... or acquired from" language replaced the "in the Territory" language of the 1923 act, and so that the right-of-way expanded from 66 to 100 feet. Lands acquired from the territory between 1949 and 1951 would not be subject to the statutory right-of-way, therefore. A 1953 amendment (ch. 35 SLA 1953) added "and a tract four rods wide between all other sections in the Territory" to the 1951 version. It is questionable whether this amendment could impose a right-of-way on lands disposed of between 1949 and 1951, assuming that was the Territorial legislature's intent. The erratic history of the 1923 statute should caution land managers to carefully scrutinize the history of a tract's title before drawing firm conclusions about the existence, and width, of a claimed AS 19.10.010 right-of-way across the tract.

intervening Territorial (state) ownership. Suffice it to say now, however, that AS 19.10.010 can be construed independently of R.S. § 2477.

## I. A BRIEF HISTORY OF THE RECTANGULAR SURVEY SYSTEM IN RELATION TO FEDERAL CONTROL OF THE PUBLIC DOMAIN

Issues surrounding rights-of-way across public domain lands are best viewed against the historical backdrop of their development. Most of the remainder of this section is derived from C. White, A History Of The Rectangular System, (Department of the Interior 1982), and it should help you understand part of the basis for our predictions concerning R.S. § 2477 disputes.

While the Spanish and French had done most of the early exploration of the North American in the 16th century, it was England which took the pragmatic position that occupancy and use was the truest test of ownership. To finance some of the needed colonization, the English sovereigns, to whom the source of all land title could be traced, granted charters for lands in America to private companies, which sold stock and undertook the expense of settlement. The lands were at best generally described, creating situations whereby Connecticut could lay claim to lands in Ohio, and Rhode Island settlers could be considered trespassers by the Massachusetts Bay Company in a border dispute that lasted

over a hundred years. In addition to corporate colonies, there were royal colonies and proprietary colonies, all with varied land bases and claims. Surveying for conveyance was by irregular metes and bounds, each parcel depending more or less on the description of its neighbors, when it existed at all. In the midst of these overlapping land claims many people also purchased land from the North American Indians (e.g., Manhattan Island), and many people simply "trespassed."

After the 1776 Declaration of Independence the new states confiscated the lands of the Crown's loyalists, and thereby became the immediate owners of millions of acres of the unsurveyed "public domain." In 1781 enough of the new states had ceded their claims to the so-called western lands such that the Articles of Confederation could be ratified. By 1783 the new United States had entered into a treaty with England, Spain and France ending the Revolutionary War, and making it the owner of all territory east of the Mississippi River, south of the Great Lakes, and north of 31° latitude.

The Northwest Territory, as the western lands in part came to be called, was the only asset that could be sold for revenue by the heavily indebted Confederation. The question was how best to sell the lands. The Thomas Jefferson camp wanted individual sales of small surveyed tracts to settlers; the Alexander

Hamilton camp wanted large grants to companies or wealthy men surveyed only by metes and bounds. The debates ended with the passage of the Land Ordinance of May 20, 1785, in effect the first important surveying statute of the United States; it caused a survey to be started in the Northwest Territories to facilitate land sales. The Ordinance called for

> (1) the beginning of a survey on the Ohio River, with the first "line" to be run due "east and west;"
>
> (2) the creation of townships 6 miles square, using 80 chains to a mile;
>
> (3) all lines to be "plainly marked by chops on the trees" to avoid the difficulty of the metes and bounds system of indiscriminate location, with the overall intent to make the survey locatable on the ground; and
>
> (4) the division of each township on plats into 36 "lots" (today called "sections"), with later on the ground survey of the lots to follow when money to survey was available.

Once seven ranges were surveyed and platted, the Secretary of War was to choose by "lot" one-seventh of the townships for grants to soldiers. The balance were to be distributed to the states for later sales at a minimum of $1.00 per acre, the first township sold in one solid tract, the second by "lot," the next in one solid tract, and so forth -- a compromise reached between the Jefferson and Hamilton camps. The hope was that surveying and platting would create certainty before the sales, and therefore

eliminate land ownership controversies.

However, surveying discrepancies 5/ and the failure to locate lots (sections) on the ground nonetheless caused boundary disputes. These disputes when coupled with land scandals and Indian wars provoked Congress in 1796 to pass 1 Stat. 464, considered the cornerstone of the creation of the "rectangular system of surveys." It required in pertinent part that

> (1) the townships and other corners would be distinctly marked so as to avoid confusion;
>
> (2) one half of the townships, taken alternatively, would be subdivided into "sections" (the first use of the term), with "section" corners set at every mile on all lines surveyed;
>
> (3) surveyors would keep detailed field notes which would be preserved, and
>
> (4) for each surveyed area the Surveyor General would create three plats with a description on the plat of both the lands and the corner monumentation, a system still in use today.

Again, emphasis was on corners and monumentation, with the ultimate purpose to avoid boundary disputes through clear, verifiable legal descriptions that outlined distinct parcels of land which

---

5/ Early surveys took no account of magnetic declination or the spherical shape of the earth, and surveying practice was crude, inconsistent, and often otherwise faulty.

did not overlap. Changes in the basic rectangular system have occurred in many respects over the years, through Surveyor General Instructions to surveyors beginning at least as early as 1815, and through statutory alterations, but the basic rectangular approach has remained constant. 6/ Eventually the surveying methodology was altered in recognition of the fact that the rectangular approach for subdivision of public lands could only work if the reality of magnetic declination and the shape of the earth were taken into account. Simply stated, surveyors realized that map or plat protractions could never be truly accurate substitutes for on-the-ground survey and corner monumentation. 7/

While early surveying methodology was crude, nonetheless the Land Ordinance of 1785 and subsequent enactments did at least take the first steps in an over century long policy favoring disposal of public domain lands. The post 1785 history was succinctly described in S. Rep. No. 94-583, 94th Cong., 1st

---

6/ See generally, 43 U.S.C. §§ 751-753. The United States system of rectangular public land surveys was extended to Alaska by the act of March 3, 1899, 30 Stat. 1098, 48 U.S.C. § 351.

7/ This point and the general history of the United States survey system becomes especially important in trying to resolve issues surrounding R.S. § 2477 rights-of-way on unsurveyed lands. For, as is hopefully by now apparent, "A survey of public lands does not ascertain boundaries; it creates them." Cox v. Hart, 260 U.S. 427, 436 (1922).

Sess., 27-29 (1976) (accompanying SB 507, the Senate version of what later was to become FLPMA) as follows:

> When Ohio, utilizing the procedures developed under the Northwest Ordinance of 1787, gained admission to the Union in 1802 (2 Stat. 173), it was given one section out of each township for the support of its common schools. From this beginning, Federal land grants to States became increasingly larger and were extended to numerous other purposes.
>
> ....
>
> In addition to providing the States with specific land grants for transportation purposes, the Federal government made a considerable number of grants directly to railroad companies and canal companies. Beginning with an 1852 general right-of-way act which granted to railroad corporations 100 foot rights-of-way across public land (10 Stat. 28), the government has granted over 94 million acres to western railroads....
>
> ....
>
> During the period of large land grants and sales, however, a series of gradual modifications of the nation's land disposal policies in the interest of individual settlers could be discerned. A series of preemption acts which authorized squatters in designated areas to purchase their claims at the minimum price led to the passage of the General Preemption Act in 1841 (5 Stat. 453). The settlers' long struggle for free land won its most significant victory with the passage of the Homestead Act (12 Stat. 392).
>
> ....
>
> Numerous additional special measures were passed to provide whatever additional lands and privileges were considered necessary to remove that Act's deficiencies and encourage private ownership of the public domain by settlers and others

for agricultural purposes, livestock grazing, and mineral exploration and development.

....

Although few of these laws could be considered entirely successful, they did result in the transfer of a significant portion of the public domain into private ownership (the homestead laws, 288 million acres; timber and stone laws, 14 million acres; timber culture laws, 11 million acres; and desert land laws, 11 million acres).

By the third quarter of the 19th Century, the numerous excesses involved in the conveyance of public domain laws, the serious problems which developed on the transferred lands, particularly overgrazing and crude and careless cultivation, and the first stirrings of the conservation movement and its "gospel of efficiency" (footnote omitted) led to demands that some public lands be preserved and maintained in Federal ownership. The first major, permanent Federal land reservation was the Yellowstone National Park, established in 1872 (17 Stat. 326). Although the concept of a national park system was given life with the passage of the National Park Service Act in 1916 (39 Stat. 535), the first system for permanently retaining Federal land was established with the provision of authority to the President in 1891 to withdraw forest lands and prevent their disposal (26 Stat. 1095).

Despite these early initiatives to retain Federal lands, in 1934 there remained approximately 166 million acres of "unreserved and unappropriated public domain" lands in the 48 States, and another 350 million acres in Alaska, subject to disposal under a wide variety of land laws. In that same year, however, the land disposal era was abruptly terminated by the enactment of the Taylor Grazing Act (48 Stat. 1269). That Act and its 1936 amendment called for withdrawal of 142 million acres of the public domain remaining open to settlement in the 48 States and the administration of the withdrawn land as public grazing districts. Upon the creation of the districts, the quantity of lands eligible for disposal declined

> substantially and disposal policy became a matter of peripheral concern. Thus, the enactment of the Taylor Grazing Act, and its mandate to classify public lands and administer their use, marked a shift in the Federal role from land purveyor to land manager. (Emphasis supplied.)

The foregoing history paints a broad, changing backdrop for the origin and later application of R.S. § 2477 rights-of-way, passed at a time when the United States was still trying to dispose of most of its public lands, rather than manage them. This is in sharp contrast to at least the last fifty years of federal land policy, a fact which may well influence federal court interpretations of R.S. § 2477 as it relates to federal lands in Alaska and elsewhere.

## II. THE ORIGIN AND INTENT OF R.S. § 2477

A reading of the act of July 26, 1866, 14 Stat. 253, from which R.S. § 2477 derives shows that it is primarily a mining law, with a secondary purpose homesteading. It was virtually the first comprehensive mining law for United States lands. See Humboldt Co. v. U.S., 684 F.2d 1276, 1281 (9th Cir. 1982) ["(A)lthough (R.S. § 2477) refers to rights of way without limitation as to purpose, the statute of which it was a part addressed solely mining and homesteading claims."]. Prior to 1866 miners had entered, settled on, and used public domain lands without benefit of federal statutory protection, and sometimes miners' dealings

with each other were handled by gunfire, only gradually coming to be ruled by local customs, later confirmed in territorial and state laws. See generally Neff, The Miners Law, 19 Idaho L. Rev. 577 (1983). For example, originally it was merely local mining custom which established the broadly accepted principle in the western United States that the first person to appropriate water for a beneficial use, such as mining or homesteading, received the protection of the law vis a vis later appropriators. Id. 234-238.

Eventually the United States Supreme Court held that the federal government had, by its conduct, recognized and encouraged and was bound to protect the rights of miners who had created and improved mines without federal statutory protection. See generally, Atchison v. Peterson, 87 U.S. 407 (1861) (discussing the history of federal treatment of mining customs). This result would be somewhat startling today, in that it effectively legitimized adverse possession and use of public domain lands against the federal government. However, it made sense in the early decades of the 1800s, since there was a virtually complete absence of federal government presence on the public domain lands, and therefore there was no way a miner or homesteader

could seek or receive permission to use these lands. 8/

Just this explanation was given in Jennison v. Kirk, 98 U.S. 453 (1870), the first case construing the 1866 act in a controversy involving the application of its section 9 to validate a mining water ditch built well before 1866. We quote the case at length here because it occurred so close in time to 1866, and thus provides the best contemporary judicial history for the 1866 act:

> The object of this section (9) was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the

---

8 / The Act of March 27, 1934, c. 99, 48 Stat. 507, 48 U.S.C. § 1489, codified the common law rule that prohibited adverse possession of lands owned by a sovereign government. See also Hayes v. Government of Virgin Islands, 392 F. Supp. 48, 51 (D.V.I. 1975) (R.S. § 2477 protects only trespassers pre-existing 1866). By the Act of February 27, 1865, ch. 64 § 9, 13 Stat. 441, 30 U.S.C. § 53 (1982), Congress eliminated, as between private litigants disputing ownership to a mining title, a defense that paramount title rested in the United States, "but each case shall be judged by the law of possession." And see also AS 38.95.010 (passed in 1949), expressly prohibiting adverse possession against Alaska territorial lands, and later state lands. The exact interplay between the concepts of user and adverse possession is unclear.

State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined .... Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced.

....

For eighteen years -- from 1848 to 1866 -- the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such

> regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States.
>
> ....
>
> And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., part iv., pp. 3225-3228.
>
> ....
>
> Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and moulded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. (Emphasis supplied.)

98 U.S. 457-60. See also, Broder v. Water Company, 98 U.S. 274, 275 (1879) (interpreting section 9 of the 1866 act to the same effect).

Of course, without the right to access to their mining claims across public lands, the legitimacy that the 1866 act granted pre-existing claims 9/ would not have left miners fully protected. So explains section 8 of the act, R.S. § 2477, insuring that miners, and homesteaders protected under section 10 of the act, would have access rights across otherwise unreserved public lands to reach their claims and improvements. While R.S. § 2477 may seem appallingly crude today, it was then an apt solution for miners and homesteaders faced with the problem of an absentee, and virtually unreachable, federal landlord.

Although R.S. § 2477 access was characterized as a "right-of-way for the construction of highways," in its proper historical context the "highway" language obviously did not mean something akin to a modern public street. The word "highway" was used generically at the time to include any public way, such as a

---

9/ Some courts have suggested R.S. § 2477 legitimized only highways which had been created before 1866. See, e.g., Anderson v. Richards, 608 P.2d 1096 (Nev. 1980); U.S. v. Dunn, 478 F.2d 443 (9th Cir. 1973); Hayes v. Government of Virgin Islands, 392 F. Supp. 848 (D. V.I. 1975). Contra Humboldt County, Nevada v. U.S., 684 F.2d 1276 (9th Cir. 1982), and Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied 411 U.S. 917 (1973). It is difficult to predict how a court will treat the claim of an R.S. § 2477 right-of-way based solely on user in light of recent statutory prohibitions on adverse possession against a sovereign government. See the immediately preceding footnote.

path, wagon road, pack trail, street, alley, and so forth. See, e.g., Cincinnati v. White, 33 U.S. (8 Pet.) 431, 432 (1831) (streets and alleys). Contra U.S. v. 161 Acres of Land, 427 F. Supp. 582 (D.Colo. 1977) (footpath/horsetrail not a "highway" under R.S. § 2477).

## III. THE RAILROAD "IN PRAESENTI" LAND GRANTS

Closely tied to the opening of the western United States to settlement were the railroad land grants. 10/ These grants were created by statutes whose case law interpretations figured prominently in the first state and federal court cases discussing R.S. § 2477.

By the act of September 20, 1850, 9 Stat. 466, Congress passed the first major law granting land to subsidize the construction of railroads. The act granted even numbered sections at specified intervals on each side of the railroad right-of-way in Illinois, Mississippi, and Alabama for the construction of the Chicago and Mobile Railroad, later to become the Illinois

---

10/ Indeed, two of the early railroad land grants were made within a few days of the passage of R.S. § 2477. See the act of July 23, 1866, 14 Stat. 210, and the act of July 25, 1866, c. 242, 14 Stat. 239.

Central. Subsequent acts did essentially the same for other railroads.

In the interpretation of these railroad land laws, the United States Supreme Court quickly construed the language of the acts as providing for a "present" grant. (The cases often use the Latin phrase "in praesenti.") Among the first of the railroad cases, and typical of them, was Schulenberg v. Harriman, 88 U.S. 551 (1874), construing an act granting lands to the State of Wisconsin in trust for construction of a railroad:

> That the Act of Congress of June 3, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the 1st section is, "That there be, and is hereby granted to the State of Wisconsin" the

the land.

88 U.S. at 554. See also Leavenworth, Lawrence, & Galveston R. Co. v. U.S., 92 U.S. 634, 637 (1876). 11/ The "present grant" language of these cases was repeatedly adhered to over the years in court cases, and essentially enunciated a contractual arrangement between the railroad and the United States:

> The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. (Citation omitted.) And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the government. In other words, it earned the right to the lands described. (Emphasis supplied.)

---

11/ In Leavenworth the "present grant" doctrine nonetheless was limited in scope so as not to retroactively interfere with the right of occupancy of the Osage Indians. 92 U.S. 638. This point becomes important when dealing with the question of R.S. § 2477 rights of way on lands occupied by Alaska Natives. See generally, Cramer v. U.S., 261 U.S. 219, 229 (1923); Alaska Public Easement Defense Fund v. Andrus, 435 F.Supp. 664 (D. Alaska 1977) [construing the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601 et seq., easement reservation provisions narrowly]. Alaska Native lands held in trust by the United States (such as allotments under the Act of May 17, 1906, 34 Stat. 197, 43 U.S.C. §§ 270-1 to 270-3 (1970) and townsites under the Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. § 733 et seq., repealed by ANCSA and FLPMA, respectively), also present land status variations that are important to keep in mind in dealing with R.S. § 2477. See, e.g., Heffle v. State, 633 P.2d 264 (Alaska 1981) [jurisdiction to determine validity of right-of-way across allotment solely in federal court under 28 U.S.C. § 1360(b)].

Burke v. Southern Pacific R.R. Co., 234 U.S. 669, 679-80 (1914). Accord, Payne v. Central Pac. Ry. Co., 255 U.S. 228 (1921) (construing the Act of July 25, 1866, c. 242, 14 Stat. 239, granting lands for a railroad to be constructed and thereafter to be and remain "a public highway for the use of the government of the United States ....").

These railroad cases figured prominently in the early R.S. § 2477 court cases because the "present grant" language was adapted to the R.S. § 2477 context.

## IV. STATE COURT INTERPRETATIONS OF R.S. § 2477 AS A "PRESENT GRANT"

The earliest cases construing R.S. § 2477 were from state, not federal, courts. The first significant decision 12/ we can find directly concerning R.S. § 2477 comes from California, appropriately enough given that the California gold rush precipitated the mining act of 1866. In McRose v. Bottyer, 22 P. 393 (Cal. 1889) the overseer of roads sought to enjoin the

---

12 / One earlier case, Red River & Lake of the Woods R. Co. v. Sture, 20 N.W. 229, 230 (Minn. 1884) in obiter dicta rejected the ironic argument that railroads were "public highways" for the purposes of an R.S. § 2477 right-of-way.

owner of a brick store who had, after acquisition of a title from the United States, fenced off a strip of land which had been used by the public as a public way since at least 1858. In answer to the defendant's contention that public user could not secure rights in public lands of the United States, the California Supreme Court said:

> The fact that the land was public land of the United States at the time the right to use it as a public way was acquired, and also at the time the use of it ceased, makes no difference. The act of congress of 1866 (section 2477, Rev. St. U.S.) granted the right of way for the construction of highways over public land not reserved for public uses. By the acceptance of the dedication thus made the public acquired an easement subject to the laws of this state. . . . (Emphasis supplied.)

22 P. 394. The underscored portion of the quote is noteworthy because some later state cases, most notably from North Dakota, South Dakota, and Kansas, imply that once an R.S. § 2477 right-of-way grant was accepted, the state or territorial government became the mere trustee of the right-of-way for the public, and thereafter could not limit or otherwise affect the public's use of the right-of-way. Contra Jennison v. Kirk, 98 U.S. 453, 458 (1870). This is the extreme view of the effect of a "dedication" of a R.S. § 2477 right-of-way for public use. Were it the correct view the sovereign government would always be permanently deprived of the power to make land use decisions as future conditions might warrant. Modern federal court decisions do not seem

to have accepted this view. See, e.g., Kinscherff v. U.S., 586 F.2d 159, 160-61 (10th Cir. 1978).

Apparently the next decision interpreting R.S. § 2477, and the first to rely heavily on the railroad "present grant" analogy, was Wells v. Pennington County, 48 N.W. 305 (S.D. 1891), a case often cited in R.S. § 2477 state court decisions. In 1877 South Dakota's Territorial Legislature passed a law providing "that all section lines shall be and are hereby declared public highways as far as practicable." Id. 305. The court in Wells held that this law represented an "acceptance of the congressional grant (in R.S. § 2477)," id. 308, and

> that the right acquired by the territory or the public was necessarily imperfect until the land accepted for highways was surveyed, and capable of identification; but when the land was surveyed and the various section lines were designated to be public highways as far as practicable, the right of the territory attached to them for that purpose, and took effect as of the date of the territorial law. (Emphasis supplied, citation omitted.)

Id. 307. In so holding the Wells court emphasized that the railroad land grant cases were "in many respects analogous to (R.S. § 2477)," which law it claimed was "a grant in praesenti that takes effect as of the date of the act." Id. 306. The Wells court's conclusion, however, missed a crucial distinction in analogizing to the railroad and other congressional land grant cases. In

those cases the private grantee, whether a railroad or other entity, typically took some action in reliance on the grant. Railroad corporations, for example, might have sold bonds to secure funds for financing construction of the rail line, the landholders no doubt assuming that subsequent land patents from the United States of alternate sections along the right-of-way would provide asset value for their investment. The corporations might gain no right to the lands, despite the "in praesenti" judicial interpretation of the grant, if they did not comply with each condition of the legislation making the grant.

In contrast, the mere passage of a law dedicating public highways, such as on surveyed (or unsurveyed) section lines, hardly provokes the same concern for the reliance interest of the "grantee" of the R.S. § 2477 "grant." The actual survey of a section line, construction of a highway, or customary use following the statutory "acceptance" might be seen as sufficient reliance and change of position, however.

The Wells court's conclusion when taken to its limit also creates a constitutional problem that today might well be decided in favor of the federal government. The South Dakota "acceptance" of the R.S. § 2477 "grant" was passed in 1877, when South Dakota was still a territory. Under the court's reasoning, effective in 1877 all section lines became impressed with an

irrevocable right-of-way for public highways, including those section lines on all public lands not then reserved. 48 N.W. at 308. 13/ In fact, Mr. Wells' 1883 patent from the United States was unable to defeat the operation of the 1877 act, even though the section line was not surveyed until 1880, after his settlement entry, and even though Pennington County took no action to appropriate the section line for public highway use until 1885.

---

13 / In Smith v. Pennington County, 48 N.W. 309 (S.D. 1891), decided the same day as Wells, the court extended its R.S. § 2477 holding to apply to all lands thereafter acquired by the United States:

> The grant of congress, being a general one, taking effect at the date of the enactment of the law, became operative at once over all the public lands acquired or to be acquired by the United States. The territorial law declaring section lines to be public highways became operative as an acceptance of the congressional grant as soon as those lines were definitely settled. The record shows that the several tracts of land mentioned in the complaint were surveyed by the United States in August, 1879, and the official plat of said survey was first filed in the United States land-office at Deadwood, it being the land district in which said lands were then situated, on the 18th day of February, 1880. This, then, was the date at which the law of congress and the territorial law attached to the public lands, making the reservation for highway purposes. (Emphasis supplied.)

Id. In Riverside Tp. v. Newton, 75 N.W. 899 (S.D. 1898) this holding was extended even further to include school lands under school lands grant legislation commonly applied to new territories.

The court held that the survey related back to perfect the right-of-way as of 1877, thus taking priority over Mr. Wells' entry. 48 N.W. at 307. Were this holding extended to its logical conclusion, the passage of 1877 territorial legislation accepting the R.S. § 2477 grant would without more impress on all then unreserved federal public lands a section line right-of-way that could not be revoked by, for example, Congress' later creation of a national wildlife refuge, even though such rights-of-way might never have been developed or used, and might be totally inconsistent with the purposes of the later federal reservation. Such a result would arguably run afoul of Congress' authority under the U.S. Const., art. IV, sec. 3 (Property Clause) to govern federal lands. See, Utah Power & Light Co. v. U.S., 243 U.S. 389, 403-04 (1917); Kleppe v. New Mexico, 429 U.S. 529, 539, 543 (1976); U.S. v. Rogge, 10 Alaska 130, 152-53 (4th. Div. Fairbanks 1941) (Congressional control over roads on public lands in Alaska recognized). See also 2 Attorney General Opinion (February 18, 1983), 17-26, 57.

Despite this constitutional problem, the Wells holding gained currency in neighboring North Dakota when in Faxon v. Lallie Civil Tp., 163 N.W. 531 (N.D. 1917), the North Dakota Supreme Court held that R.S. § 2477 once accepted by a statutory enactment was effective without regard to the fact the lands were

then unsurveyed. Later survey of a section line merely retroactively "perfected" the right-of-way to take priority over any interim conveyances. Id. 533. In contrast, Oregon rejected this position in Wallowa County v. Wade, 72 P. 793, 794 (Or. 1903) ("The right is necessarily indefinite, and in a sense, floating and liable to be extinguished by a sale or disposition of the land until the highway is surveyed and marked on the ground, or in some other way identified or designated. . . .").

Since Wells, both North and South Dakota have held under each's statutes that "section line highways" are open to the public without any official action, at least in certain rural areas. Small v. Burleigh Cty., 225 N.W. 2d 295, 298 (N.D. 1974); Lawrence v. Ervert, 114. N.W. 709, 710-11 (S.D. 1908). So also has Kansas. See Troll v. Koles, 70 P. 881 (Kan. 1902) (statute identical to the Dakotas' statute). The respective courts have reached their conclusions after reviewing state legislation to ascertain whether their legislatures had, after R.S. § 2477 acceptances, thereafter enacted comprehensive road siting and construction statutes that delegated the authority to public agencies to actually "open" section line highways. In Small v. Burleigh Cty., for example, the North Dakota court found:

> We hold that congressional section lines outside the limits of incorporated cities, unless closed by proceedings permitted by statute, are open for public travel without the necessity of any prior

> action by a board of township supervisors or county commissioners. (Emphasis supplied.)

225 N.W. 2d 300. This conclusion drew a sharp dissent:

> It is incongruous to presume that rights-of-way for public use, accepted by action of the state, or its predecessor, are not subject to regulation and control by the state.
>
> ....
>
> Our present legislation regarding public highways incorporates a total governmental framework for dealing with this complex area.

Id. 302-03 (D. Johnson, dissenting). 14/

---

14 / In State of Alaska v. Village Developers, Inc., No. 78-2482 Civ. at 21 (Alaska Super., 3d Dist., Anchorage, January 29, 1979) Judge James Singleton concluded that until a section line easement is vacated under AS 19.10.010, "It is therefore open for travel and improvement by the public generally." This conclusion was reached without differentiating between state owned and privately owned land, and without a detailed analysis of Alaska laws governing highway construction, state land use (see, e.g., AS 19.10.015(a) and AS 38.05.850), or municipal corporation powers. See also Fisher v. Golden Valley Electric Ass'n, 658 P.2d 127 (Alaska 1983). Cf. Kinscherff v. U.S. 586 F.2d 159 (10th Cir. 1978) (members of public do not "own title" to public roads); U.S. v. 161 Acres, Grand Cty. Colo., 427 F. Supp. 582, 584 (D. Colo. 1977) ("At best, the statute permits construction of public highways by a government body."). The better view in our opinion is that state government holds validly dedicated rights-of-way across state owned land in trust for future development, and in the meantime may condition their use by a member of the public through powers granted to protect state land, such as those in AS 38.05.850. If the land is conveyed out of state ownership, the right-of-way stays with state unless it is properly vacated. The effect is that should the state decide to develop an access on the right-of-way, it need not purchase or condemn the right-of-way to do so.

State courts have also divided on whether R.S. § 2477 rights-of-way can be perfected by user without government funding or maintenance, or other action by a public agency. Colorado, Oregon, Idaho, Wyoming, New Mexico, Nevada, and Utah, among others, have clearly acknowledged user as a form of perfection. 15/

Nicholas v. Grassle, 267 P. 196 (Colo. 1928); Hatch Bros. Co. v. Black, 165 P. 618 (Wyo. 1917); Wilson v. Williams, 87 P.2d 683 (N.M. 1939); Anderson v. Richards, 608 P.2d 1096 (Nev. 1980); Lindsay Land & Livestock Co. v. Churnos, 285 P. 146 (Utah 1930). An interesting question remains as to who gets "title" following an adequate period of user. See generally Annot., 18 A.L.R. 3d 678, 691-92 (1968)). Cf., Streeter v. Stahnaker, 85 N.W. 47 (Neb.

---

15 / Alaska is in this group. Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961). But see AS 38.95.010, which since 1949 has precluded adverse possession of territorial and state lands. Hamerly makes no mention of AS 38.95.010's interplay with the concept of "user," and perhaps it was not raised as a defense. See also AS 29.71.010 (1985 Supp.) ("A municipality may not be divested of title to real property by adverse possession.").

1901) (dedication and acceptance needed following user).

In contrast, in Arizona a formal resolution by a local government body after construction is needed to perfect the right-of-way, and mere user is not enough. Tucson Consolidated Copper Co. v. Reese, 100 P. 777 (Ariz. 1909); Arizona v. Crawford, 552 P.2d 586, 590 (Ct. App. Ariz. 1968) ["(T)he highway must be established in strict compliance with the provisions of Arizona law."].

Recognition of user seems a logical outgrowth of the pre-1866 history of R.S. § 2477, given that Congress clearly sought in the 1866 act to validate at least existing, if not also future, uses across public lands associated with mining activity.

In summary, therefore, state courts have in the past recognized "acceptance" of the R.S. § 2477 right-of-way "grant" by

(1) user (various states, including Alaska);

(2) user plus some mode of formal dedication and acceptance (e.g., Nebraska);

(3) mere statutory dedication, such as of section lines, without more (e.g., Kansas, North Dakota, South Dakota, Alaska); 16/ or

(4) construction plus formal dedication (e.g., Arizona).

## V. CHANGING FEDERAL INTERPRETATIONS OF R.S. § 2477

The first major federal court interpretation of R.S. § 2477 was Colorado v. Toll, 268 U.S. 228 (1925). In that case the superintendent of the Rocky Mountain National Park asserted full authority over all highways in the Park, including the regulation of automobiles for hire and the exaction of license fees from privately owned vehicles. The roads had been built by Colorado and its counties "under the grant of right in Revised Statutes, § 2477 ... before the park was laid out." 268 U.S. at 269. The park was created in 1915, and its authorizing statute stated that creation of the park did not "affect any valid . . . entry under the land laws of the United States . . . for right(s)

---

16 / At least one federal court, in somewhat extraordinary circumstances, intimated that some form of statutory dedication may be sufficient. See Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied 411 U.S. 917 (1973) (trans-Alaska pipeline haul road).

of way" and further indicated that "no lands located within the park boundaries now held in private, municipal, or state ownership shall be affected by or subject to the provisions" of the act creating the park. Id. Colorado, objecting to the highway controls, sued. Colorado claimed that Congress did not have power to "curtail its jurisdiction or rights without an act of cession from it and an acceptance by the general government." Id. The United States Supreme Court perfunctorily held that "the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly decided." Id. If this holding had any substance, it was substantially diminished in Kleppe v. New Mexico, 426 U.S. 529 (1976), which reaffirmed unlimited congressional power over public lands under U.S. Const. art. IV by saying:

> [I]n Colorado v. Toll, 268 U.S. 228, 230-231, 45 S.Ct. 505, 506, 69 L.Ed. 927 (1925), the Court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause. 12/ (Emphasis supplied.)

---

12/ While Colorado thus asserted that, absent cession, the Federal Government lacked power to regulate the highways within the park, and the Court held that the State was entitled to attempt to prove that it had not surrendered legislative jurisdiction to the United States, at most the case stands for the proposition that where Congress does not purport to override state power

> over public lands under the Property Clause and where there has been no cession, a federal official lacks power to regulate contrary to state law. (Emphasis supplied.)

426 U.S. 544, and n.12. The Court thus reaffirmed federal legislative authority over public lands, forcing inconsistent state laws to accede in the face of congressional enactment. 426 U.S. 543. The Ninth Circuit Court of Appeals confronted with similar issues has recently said the same about Congressional power over federal lands. Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1083-84 (9th Cir.) aff'd 445 U.S. 947 (1980) ["'(A) different rule would place the public domain of the United States completely at the mercy of state legislation...'." cite omitted]. We note that while FLPMA contains a savings clause in § 701(a) for valid rights-of-way, § 509(a) of FLPMA also gives the Department of the Interior authority to cancel the right-of-way and replace it with an alternative access.

While Colorado v. Toll said little of import about R.S. § 2477, Central Pacific Ry. Co. v. Almeda, 284 U.S. 463 (1932) did, but unfortunately solely in a retrospective context. In Central Pacific Ry. Co. a public highway was laid out and declared such under state law by Alemada County in 1859. Thereafter, in 1862 Congress gave a railroad a right-of-way grant that, because of the terrain, embraced lands in which the highway right-of-way eventually was forced to run because floods and

natural disturbances forced portions of the highway to be reconstructed and realigned. After discussing the general principles that found relevance in Broder v. Water & Mining Co, 101 U.S. 274 (1879) and Jennison v. Kirk, 98 U.S. 453 (1870), discussed above, and the history of the 1866 act, the United States Supreme Court rejected the railroad's claim to certain of the highway lands. It held:

> We cannot close our eyes to the fact that long before the act of 1866, highways in large number had been laid out by local, state, and territorial authority, upon and across the public lands. The practice of doing so had been so long continued and the number of roads thus created was so great, that it is impossible to conclude otherwise than that they were established and used with the full knowledge and acquiescence of the national government. These roads, in the fullest sense of the words, were necessary aids to the development and disposition of the public lands. (Citations omitted.) They facilitated communication between settlements already made, and encouraged the making of new ones, increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against destruction or impairment as a result of subsequent grants follows as a rational consequence. The section of the act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was, so far as then existing roads are concerned, a voluntary recognition and confirmation of pre-existing rights, brought into being with the acquiescence and encouragement of the general government.
>
> It follows that the laying out by authority

> of the state law of the road here in question created rights of continuing user to which the government must be deemed to have assented. Within the principle of the decisions of this court heretofore cited, they were such rights as the government in good conscience was bound to protect against impairment from subsequent grants. (Emphasis supplied.)

284 U.S. 472-73. Pre-1866 highways consequently have the United States Supreme Court's stamp of approval under R.S. § 2477. There have been no further United States Supreme Court opinions concerning the scope of R.S. § 2477 since Central Pacific Ry. Co. 1932

Federal Court of Appeals and District Court decisions, in turn, are surprisingly few in number and neither particularly helpful nor consistent. See, e.g., Bennett County, South Dakota v. U.S., 394 F.2d 8 (8th Cir. 1968) (1851 Treaty of Fort Laramie "reserved" Indian lands so as to make R.S. § 2477 inapplicable); United States v. Dunn, 478 F.2d 443, 444-45, and n.2 (9th Cir. 1973) (R.S.§ 2477 "passed to protect persons who have already encroached upon the public domain" who would otherwise be considered trespassers), and accord, Hayes v. Government of Virgin Islands, 392 F. Supp. 48, 51 (D. V.I. 1975); Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974) (absence of an express reservation of a R.S. § 2477 right-of-way in United States patent to private landowners did not preclude assertion of the easement); Bird Bear v. McLean Cty., 513 F.2d 190 (8th Cir. 1975) (adopting the view that North Dakota's 1871 highway act was

acceptance of the R.S. § 2477 grant under North Dakota state court interpretations); U.S. v. 161 Acres of Land, 427 F. Supp. 582, 584 (D. Colo. 1977) (rejecting claim that a "footpath/horsetrail" in existence before the creation of the Rocky Mountain National Park was a highway under R.S. § 2477 and indicating "At best, the statute permits construction of public highways by a government body."); Kinscherff v. U.S., 586 F.2d 159, 160-61 (10th Cir. 1978) ("Members of the public as such do not have 'title' in public roads" so as to bring suit under the Quiet Title Act, 28 U.S.C. § 2409a, to quiet title to an alleged R.S. § 2477 public highway); Park and Sweet Grass Counties, Montana v. U.S., 626 F.2d 718, 720-21 (9th Cir. 1980) (12 year statute of limitations in Quiet Title Act, 28 U.S.C. § 2409a, a bar to a local government's claim to an R.S. § 2477 right-of-way across lands located in Gallatin National Forest, which had been established in 1902); Humboldt County, Nevada v. U.S., 684 F.2d 1276, 1280-81 (9th Cir. 1982) [county's right-of-way claim barred by the Quiet Title Act's twelve year statute of limitations; 1934 Executive Order of Withdrawal precluded R.S. § 2477 right-of-way; R.S. § 2477 addressed solely to mining and homesteading claims, and precludes right-of-way for recreational purposes; U.S. v. Dunn, supra, incorrect in restricting R.S. § 2477 to pre-1866 highways].

Perhaps the two substantively most 17/ significant federal court cases are Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied 411 U.S. 917 (1973), and U.S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411 (9th Cir. 1984).

In Wilderness Society an attempt was made to prevent the Secretary of the Interior from granting rights-of-way for the trans-Alaska oil pipeline and haul road. The court interpreted the effect of AS 19.40.010(a), 18/ a statute passed to create the haul road:

> Ordinarily this expression of intent would constitute valid acceptance of the right-of-way granted in Section 932. That section acts as a present grant which takes effect as soon as it is accepted by the State. 90/ Troll v. Kolles, 65 Kan. 802, 803, 70 P. 881, 882 (1902); cf. Railroad Co. v. Baldwin, 103 U.S. 426, 429, 26 L.Ed.2d 578 (1880). All that is needed for acceptance is some "positive act on the part of the appropriate public authorities of the state clearly manifesting an

---

17 / To the extent that the state may wish to claim an R.S. § 2477 across federally owned lands, cases noted above construing the Quiet Title Act's twelve year statute of limitations also have great significance. See, e.g., Humboldt County, Nevada v. U.S., 684 F.2d 1276 (9th Cir. 1982).

18 / AS 19.40.010(a) reads: "The legislature finds and declares that there is an immediate need for a public highway from the Yukon River to the Arctic Ocean and that this public highway should be constructed by the State at this time...."

intention to accept ..." Hamerly v. Denton, Alaska, 359 P.2d 121, 123 (1961) (footnote omitted).

---

90/ Since the section acts as a present grant, it is normally not even necessary for the builder of the highway to apply for a right-of-way. See 43 C.F.R. § 2822.1 (1972): "No application should be filed under [43 U.S.C. § 932], as no action on the part of the Government is necessary." However, since § 932 applies only to land "not reserved for public use," and the lands sought to be used for highway purposes were considered reserved for public use under Public Land Order No. 4582, Jan. 17, 1969, 34 Fed. Reg. 1025, application was necessary under 43 C.F.R. § 2822.1-2 (1972) to request that the reservation be revoked or modified so as to permit construction of the highway. (Emphasis supplied.)

479 F.2d 882, and n.90. Wilderness Society seems to stand for three somewhat dim propositions with respect to R.S. § 2477. First, apparently some modicum of statutory acceptance of an R.S. § 2477 right-of-way on unreserved federal public lands was possible prior to R.S. § 2477's repeal in 1976. Unfortunately, the minimum for an adequate statutory expression is not defined, and the trans-Alaska pipeline haul road received such extraordinary federal and state statutory attention as to leave Wilderness Society a weak beacon to follow. It remains unclear, therefore, whether a generalized statutory section line dedication, or the delineation of the highway's length, its funding, and so forth, even without federal cooperation, is enough. Second, perhaps something less than statutory acceptance is sufficient for an

R.S. 2477 acceptance if it nonetheless amounts to a "positive act on the part of appropriate public authorities of the state clearly manifesting an intention to accept...." In Wilderness Society the Alaska Department of Highways had made application to BLM for the right-of-way, studies of the road had been made in 1951 and 1965, state money had been appropriated for further study and mapping, and the state and Alyeska Pipeline Service Company had entered into a contract for design and construction of the road. Whether these actions were sufficient alone without the passage of AS 19.40.010 is unfortunately unclear. Third, use of R.S. § 2477 for rights-of-way to facilitate oil drilling was consonant with Congress' intent in 1866 to facilitate mineral development. Presumably utility uses connected with mineral development would also pass muster, but ones unconnected with mineral development, or homesteading, would not. Humboldt County, Nevada v. U.S., 684 F.2d 1276, 1282 (9th Cir. 1982); cf. Fisher v. Golden Valley Electric Assn., Inc., 658 P.2d 127, 130 (Alaska 1983) [utility could, without a permit, 19/ properly construct power line on a section line easement reserved but not used for highway purposes,

---

19/ In Fisher, apparently no state owned land was involved. Were state owned land at issue, at least AS 38.05.850 (right-of-way controls), AS 19.10.015(a) (reservation of public lands), and 11 AAC 96 (governing land uses on state owned land), would have had to figure in the analysis.

under AS 19.25.010 and 17 AAC 15.031(a)].

More important than Wilderness Society for the future application and interpretation of R.S. § 2477 is U.S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411 (9th Cir. 1984), reversing 565 F. Supp. 788 (D. Mont. 1983). In 1901 American Bar Road was declared a public road under R.S. § 2477 by Montana's Lewis and Clark County. In 1905 the Helena National Forest was created, through which the road passed. 565 F. Supp. at 790. In 1973 the Gates of the Mountains Lakeshore Homes Subdivision was developed, with a primary access to it being the American Bar road. The Montana Power Company unsuccessfully sought a Forest Service permit to bury a powerline to the subdivision along the road. The county, however, granted the company a permit, so the company went ahead and installed the powerline. The Forest Service sued to have the powerline removed. The District Court held that "state law controls the interpretation of the scope of pre-existing R.S. § 2477 roadways, whereas federal law controls the establishment of new R.S. § 2477 roadways," and consequently a Forest Service permit was not needed. 565 F. Supp. 788-89. 20/

---

20 / In Fisher v. Golden Valley Electric Assn., Inc., 658 P.2d 130, and n.9, the Alaska Supreme Court also concluded that "state law governs this issue," but noted that the appellants had not
(Footnote Continued)

The Ninth Circuit Court of Appeals reversed. After noting that any doubt as to the scope of an R.S. § 2477 grant "must be resolved in favor of the (federal) government," the Court of Appeals rejected the argument that Congress intended the R.S. § 2477 grant to be construed according to the law of the state. 732 F.2d 1413. It therefore reversed the District Court's decision insofar as it decided that the Montana Power Company did not "trespass upon the rights of the United States in the American Bar Road." Id. 1414. It then remanded the case.

The Court of Appeals in Gates of the Mountains Lakeshore Subdivision relied heavily on Utah Power & Light Co. v. U.S., 243 U.S. 389 (1917). There the United States Supreme Court held that legislation enacted in 1896 21/ concerning rights-of-way across public lands for power transmission superseded section 9 of the act of July 26, 1866, 22/ ch. 262, 14 Stat. 251, 253, R.S. § 2339, governing the grant of rights-of-way for

---

(Footnote Continued)
cited any "applicable authority indicating that federal law would reach a different result."

21/ The 1896 legislation read in pertinent part: "That the Secretary of the Interior ... is ... authorized ... to permit the use of right of way to extent of twenty five feet ... for ... electric power (purposes)." Act of May 14, 1896, ch. 179, 29 Stat. at L.120, Comp. Stat. 1913, § 4944.

22/ Recall that R.S. § 2477 was section 8 of this same act.

ditches, canals and reservoirs. The court remarked that "Obviously this legislation was primitive," 243 U.S. 405, and noted that the later legislation "dealt specifically with that subject (utility rights-of-way), covered it fully, embodied some new provisions, and evidently was designed to be complete in itself." Id. Exactly the same argument could be made, of course, with respect to R.S. § 2477 and the later plethora of highway, land management, environmental, and land reservation laws which have been enacted since 1866 and which deal with federal and state lands. 23/

In any event, the current Ninth Circuit Court of Appeals' view of R.S. § 2477, as announced in Gates of the Mountain Lakeshore Subdivision, is that the question of both the establishment and the scope of an R.S. § 2477 right-of-way over federal public lands is a question of federal, not state, law. This view sharply contrasts with the view of state courts, which

---

23/ With respect to Alaska, for example, as early as 1905 Congress passed statutes giving the Secretary of War authority to construct wagon roads and pack trails when of "substantial value or importance for mining, trade, agricultural, or manufacturing purposes." See 48 U.S.C. § 322. Operating under authority granted in the act of June 30, 1932, c.320, § 2, 47 Stat. 446, 48 U.S.C. 321a (repealed in 1959), the Secretary of the Interior also promulgated a number of orders establishing public highway rights-of-way in Alaska. See generally State v. Alaska Land Title Ass'n, 667 P.2d 714 (Alaska 1983).

normally have determined on their own what constituted "acceptance" of the R.S. § 2477 "grant" pursuant to state law. As a practical matter what this means is that state courts may continue to apply state law in determining the establishment and scope of rights-of-way as long as state land is involved and the rights of the private property owner contesting the existence of the right-of-way or its scope do not derive from a federal source. When federal land is involved or the private property owner's rights originate from the federal government without intervening state ownership such that Congressional or Executive Branch power over federal land becomes an issue, the question will be one of federal, not state, law. In addition, when the subject private property is held in trust by the United States, jurisdiction to decide the R.S. § 2477 issue will reside exclusively in federal court. Heffle v. State, 633 P.2d 264 (Alaska 1981); 28 U.S.C. § 1360(b).

The immediate impact of Gates of the Mountain Lakeshore Subdivision can be seen in two very recent Department of the Interior decisions. Prior to Gates of the Mountain Lakeshore Subdivision, the Department had consistently held that R.S. § 2477 "was self-executing and required no Departmental approval...." John v. Hyrup, 15 I.B.L.A. 412, 420 (June 12, 1974). Moreover, the department had consistently followed the favored analogy of

the railroad land grant cases in interpreting R.S. § 2477. See, e.g., Wason Toll Road Co. v. Townsite of Creede, 21 L.D. 351 (1895). It also had generally deferred to state law. See Limitation of Access to Through Highways Crossing Public Lands, 62 L.D. 158, 161 (April 15, 1955) ["The (R.S. § 2477) grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located.... Whatever may be construed as a highway under State law is a highway under Rev. Stat. sec. 2477, and the rights thereunder are interpreted by the courts in accordance with the State law."]. In 1980 the Department significantly tempered this deference to state law in a lengthy opinion from Deputy Solicitor of the Department to James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice. The opinion indicated that "it is our view that R.S. 2477 was an offer by Congress that could only be perfected by actual construction, whether by the state or local government or by an authorized private individual, of a highway open to public use, prior to October 21, 1976, on public lands not reserved for public uses." 24/ (Emphasis supplied.) Opinion of Deputy Solicitor -- Standards To Be Applied In Determining Whether Highways Have

---

24 / The October 21, 1976 date in the quote is the effective date of FLPMA, which repealed R.S. § 2477.

Been Established Across Public Lands Under The Repealed Statute R.S. 2477 (43 U.S.C. § 932), 8-9 (April 23, 1980). Implicit in the latter opinion is the assumption, explicitly accepted in Gates of the Mountain Lakeshore Subdivision, that federal, not state, law decided how an R.S. § 2477 right-of-way could be created.

Most recently, in Mountain Bell, 83 I.B.L.A. 67, 71 (September 26, 1984) the Department's Interior Board of Land Appeals, citing Gates of the Mountain Lakeshore Subdivision, held that the question of the scope of an R.S. § 2477 right-of-way is one of federal law, and that a valid R.S. § 2477 right-of-way across federal land could not be used for a telephone cable line absent BLM permission. The Board reasoned that "at least since 1901 the scope of an R.S. § 2477 right-of-way grant has not encompassed the legal right (in the state) to grant third-party rights-of-way," including such rights-of-way for utility purposes. 25/

Accord, Mountain States Telephone & Telegraph Co., 84 I.B.L.A.

---

25 / Under this reasoning, Fisher v. Golden Valley Electric Assn, 658 P.2d 127 (Alaska 1983), which allowed utility use of an RS § 2477 right-of-way, would have been incorrectly decided had federal land been involved. In fact, apparently only privately owned land was. See the lower court opinion, No. 4FA-79-1757 Ci. 5 (Alaska Super. Aug. 29, 1980).

1 (November 21, 1984). This conclusion represents a sharp departure from previous Department of the Interior rulings, and bodes ill for the persuasiveness of any argument before the Department that R.S. § 2477 rights-of-way on section lines (surveyed or unsurveyed) 26/ exist on federal lands in Alaska by the mere fact of the passage of a dedicating statute in 1923. The federal government's changing position over the years with respect to R.S. § 2477 -- indeed, its apparent prior acquiescence in state law -- will not prevent it from asserting what it may now claim is the more correct interpretation of the law. See U.S. v. California, 332 U.S. 19, 39-40 (1947).

## VI. ALASKA COURT INTERPRETATIONS OF R.S. § 2477

Although the Treaty of Cession with Russia occurred less than a year after the passage of R.S. § 2477, no congressional action with respect to Alaska occurred until the District

---

26 / In P.C. Beckley, Report On 44 L.D. 513, R.S. 2477 And Section Line Easements In Alaska, (October, 1977), IV, § 1, the then Chief, Branch of Lands and Minerals, BLM Alaska Office, opined that "'a section line easement,' by definition required that the land be surveyed under the rectangular system" and that if "there are no interior section lines surveyed, (then) ... no section line easements." Mr. Beckley's opinion is probably a good index of what Department of Interior wide thinking will be on AS 19.10.010's impact, if any, on federal lands.

Organic Act of May 17, 1884, c. 53, 23 Stat. 24, which made all the lands Russia ceded to the U.S. and known as "Alaska" a civil and judicial district. Under section 7 of the Act "the general laws of the State of Oregon now in force (were) ... declared to be the law in said district...." 27/ and under section 8 "the laws of the United States relating to mining claims, and the rights incident thereto, shall from and after the passage of this act, be in full force and effect in said district...." Thus, as earlier as May 17, 1884, R.S. § 2477 would have applied to unreserved lands in Alaska. 28/

The District Organic Act of 1884 protected "occupants and settlers" on Alaska lands, but all others were considered mere trespassers against the federal government. Russian-

---

27 / The Oregon Supreme Court held in 1903 that the acceptance of R.S. § 2477 could occur through user if an adequate period of user was followed by a survey and official public action by a county government. See Wallowa City v. Wade, 72 P. 793, 497 (Or. 1903) (interpreting Or. Rev. Stat. 368.131, which reads: "The county governing body may by resolution accept the grant of rights of way for the construction of public roads over public lands of the United States. This section does not invalidate the acceptance of such grant by general public use and enjoyment.").

28 / In section 8 of the District Organic Act of May 17, 1884, c.53, 23 Stat. 24, the general land laws of the United States were expressly made inapplicable to Alaska. In U.S. v. Rogge, 10 Alaska 130, 149 (4th Div. Fairbanks 1941), the court held that R.S. § 2477 was not a "general land law", and therefore it did apply to Alaska. Therefore, R.S. § 2477 applied to Alaska as of 1884 either because it was not a "general land law" or because it was part of the federal mining law, or for both reasons.

American Packing Co. v. U.S., 199 U.S. 570, 576 (1905). The "vacant, unoccupied and unappropriated lands in Alaska at the date of cession" were otherwise considered part of the public domain of the United States, U.S. v. Berrigan, 2 Alaska 442 (3rd Div. Fairbanks 1905), to which, presumably, R.S. § 2477 rights-of-way might attach.

Originally Congress gave the Secretary of War Alaskan road construction duties, as implemented through the Alaska Road Commission. Act of January 27, 1905, 33 Stat. 616, 48 U.S.C. § 322. This act read in pertinent part:

> The Secretary, or such officer, or officers, as may be designated by him, shall have the power, and it shall be his duty, upon his own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of Alaska to any town, mining or other industrial camp or settlement, or between any such town, camps, or settlements therein, if in his judgment such roads or trails are needed and will be of permanent value for the development of Alaska; but no such road or trail shall be constructed to any town, camp, or settlement which is wholly transitory or or no substantial value or importance for mining, trade, or manufacturing purposes.

48 U.S.C. § 322. Section 2 of the act (48 U.S.C. § 323) required the Secretary to map every road or trail so located. While it might be contended that prior to 1905 R.S. § 2477 granted private citizens the right to construct highways across Alaska's public domain, presumably even this claim of right ended with the act of

January 27, 1905. See the Utah Light & Power Co. v. U.S. discussion above at page _____. Interestingly, however, 48 U.S.C. § 322's potential impact seems to have all but been ignored in administrative and court decisions concerning R.S. § 2477 in Alaska.

The Alaska Organic Act of August 24, 1912, ch. 387, 37 Stat. 512, created the territorial governmental unit, i.e., the Territory of Alaska, with provisions for a legislature and a governor with veto power. Under section 20 of this Act, all laws the government adopted were effective unless Congress expressly disapproved them. One never disapproved by Congress and passed in 1923 by the Territorial Legislature was the precursor to the current AS 19.10.010, ch. 19, Laws of Alaska, section 1. It read as passed in 1923:

> A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. (Emphasis supplied.)

The underscored portion of the statute has seen substantial revision over the years. This fact is important to remember in the evaluation of whose land AS 19.10.010 purports to affect. For it is not clear what the 1923 Territorial Legislature meant by "in

the Territory of Alaska," since the "Territory" created by the Organic Acts of 1884 and 1912 included all lands ceded from Russia; presumably, therefore, any law the Territorial Legislature passed applied to all of the Alaska land mass. Act of August 24, 1912, ch. 387, 37 Stat. 512, § 1. 29/ By 1923, however, Congress had given to the Territory of Alaska, using "grant" language, four sections of land for an agricultural college and school of mines. 30/ Congress had also, although without using the typical grant language, "reserved" sections "16 and 36 in each township in (the Territory) for the support of common schools...." It may have been that the Territorial Legislature had by 1923 begun thinking of the Territory as an entity distinct from the territorial land mass (i.e., the federal public domain in Alaska). This distinction does appear to have figured in later amendments made to the 1923 act in 1951 and 1953, although we

---

29/ § 1 reads: "That the Territory ceded to the United States by Russia ... and known as Alaska ... shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws."

30/ The pertinent language of the act of Mar. 4, 1915, c.181 § 2, 38 Stat. 1215, 48 U.S.C. § 354, indicated that the sections for the college "are granted to the Territory of Alaska...," unlike the reservation language for the common school lands, 48 U.S.C. § 353. The "grants" to the Territory in this latter act were confirmed to the state in the Statehood Act, Pub.L. 85-508, § 6(z), 72 Stat. 339.

obviously can only guess at the Territorial legislature's intent in those later two years as well.

In any event, there is no legislative history for the 1923 act, the Territorial House and Senate Journals being completely silent as to the intent of Senate Bill No. 8, which became the 1923 act. The then "newspaper of legislative record", the (Juneau) Alaska Daily Empire, reported in its Monday, March 12, 1923 edition, page 8:

> Senate Bill No. 8, an Act to dedicate four rods along each section line for highway purposes favorably reported last week, was passed by unanimous vote. Similar laws, it was stated, had been enacted in virtually all of the western public land states and are based on authority of Federall (sic) law.

There was no other Alaska Daily Empire press account explanation of Senate Bill No. 8 occurring between the bill's introduction on March 8, 1923 and its approval on April 16, 1923.

The first Alaska case construing the 1923 act was Clark v. Taylor, 9 Alaska 298 (4th Div. Fairbanks 1938). In Clark a miner with a placer claim called the "Spot Association" sued to prevent the Alaska Road Commission from improving a road across his claim. The Commission built the road in 1917, five years after the miner's entry and without the miner's permission. The

court held that the Commission had no right to build the road but that "The public may, by user, accept the dedication contained in section 2477, R.S.U.S ...." This public acceptance had occurred, the court said, because of 20 years of adverse public use. Id. 308. The remaining issue was how wide the road could be, and on this point the court decided that the four rod dedication of ch. 19 SLA 1923 (AS 19.10.010) could not figure in the analysis:

> [T]he statement of facts does not show whether the Spot Association is on surveyed or unsurveyed lands, so the dedication contained in Chapter 19, S.L.A. 1923, establishing public highways along section lines could have no bearing in this case.

Id. This is the only discussion in Alaska case law concerning unsurveyed "section lines", and clearly implies that a survey must precede the creation of a R.S. § 2477 right-of-way if made through AS 19.10.010's "acceptance."

In the same year as Clark the Anchorage District Court held that under R.S. § 2477 "a highway grant may be accepted by the public without acceptance by the public authorities and continued use of the road under circumstances clearly indicating an intention to accept is sufficient (emphasis supplied)." Berger v. Ohlson, 9 Alaska 389, 395 (Third Div. Anchorage 1938). Within a few years a Fairbanks District Court held the same in U.S. v. Rogge, 10 Alaska 130, 151 (4th Div. Fairbanks 1941). The concept

of user was firmly accepted by the Alaska Supreme Court in Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).

In Hamerly and later in Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975) the Supreme Court expressly held that AS 19.10.010 was an acceptance of the federal grant of right-of-way in R.S. § 2477. 31/ In Anderson v. Edwards, 625 P.2d 282 (Alaska 1981) the supreme court restricted width of an AS 19.10.010 right-of-way by a private citizen only to that which was "reasonable." In Fisher v. Golden Valley Electric Ass'n, 658 P.2d 127 (Alaska 1983), the Court permitted utility use of an R.S. § 2477 right-of-way. Section line right-of-way use for utilities on privately owned land is now governed by 17 AAC 15.031. For further discussion of Fisher, see notes 20 and 25 above.

Most recently, in Alaska v. Alaska Land Title Assoc., 667 P.2d 714, 722 (Alaska 1983) the Alaska Supreme Court, in what

---

31 / In doing so Girves rejected the reasoning in 11 Attorney General Opinion (July 26, 1962) that AS 19.10.010 was not such an acceptance because of the disabling effect of 48 U.S.C. § 77 (section 9 of the Territorial Organic Act), which prohibited the territorial government from passing any law "interfering with the primary disposal of the soil." 536 P.2d at 1225-26. This Attorney General Opinion had previously been overruled in 7 Attorney General Opinion (December 18, 1969). No federal court has addressed the effect of 48 U.S.C. § 77 on state attempts to accept an R.S. § 2477 grant by passing a statutory dedication.

surely is an understatement, called R.S. § 2477 "a statute remarkable for its brevity," and then dealt with the question of the impact of DO 2665, 16 Fed. Reg. 10,752 (1951). DO 2665 was a Department of the Interior land order that established the width of "public highways" in Alaska then under the jurisdiction of the Secretary of the Interior. At issue was whether a staking requirement in DO 2665 affected highways in existence before DO 2665. The Alaska Supreme Court indicated that it did not, and instead said that it applied only to "new construction." Id. 722. In doing so the court adopted the reasoning of the director of the U.S. Bureau of Land Management that "One purpose of DO 2665 was to define as a matter of local law or usage the width of roadway easements which had been created by the construction of roads and which would be created in the future by the construction of new roads ...." since R.S. § 2477 did not of itself establish the width of rights-of-way under the Secretary of the Interior's jurisdiction. Id.

## VII. PROTRACTIONS -- LEGAL IMPACT

Since as we indicated at the outset the state has authority under AS 38.04 and 38.05 to reserve any type of right-of-way it desires in making future conveyances of state owned

land, no matter how amorphous such right-of-way might be, 32/ your questions concerning the impact of AS 19.10.010 on unsurveyed "section lines" are most important in the context of lands previously conveyed out of state ownership, federally owned lands, or lands conveyed out of federal ownership directly to private parties without any intervening state ownership. And, since the history of AS 19.10.010 suggests it was intended to be an acceptance of the R.S. § 2477 grant, see Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975), its significance independent of its interplay with R.S. § 2477 is at least somewhat speculative. Since AS 19.10.010 was apparently intended to respond to R.S. § 2477, a federal law, federal case law concerning when a section line is legally created and when it can defeat intervening entries becomes important even in the context of state owned land. Of course, federal case law will be absolutely determinative with respect to federal lands and those that pass out of federal ownership directly to private parties under the

---

32 / An excellent example of an amorphous right-of-way is the "floating, public, 300 foot wide transportation easement ... to be determined upon the ground at such future time as a need exists ..." provided for pursuant to the "Terms And Conditions For Land Consolidation And Management In The Cook Inlet Area," (December, 1975) Appendix C, IB(3), at 34, between the state and Cook Inlet Region, Inc. (CIRI) and authorized by ch. 19 SLA 1976. Appendix C, II, of the foregoing also expressly allows the state to reserve "dedicated or platted section line easements" in making conveyances to CIRI. Id. 35.

holding of U.S. v. Gates of the Mountain Lakeshore Subdivision, 732 F.2d 1411 (9th Cir. 1984) discussed above. See also Heffle v. State, 633 P.2d 264 (Alaska 1981) (federal trust lands).

Unfortunately, we have found no federal court case which has looked at the question of R.S. § 2477's interplay with a state's purported statutory dedication of an unsurveyed "section line" right-of-way, save for Clark v. Taylor, 9 Alaska 298, 312 (4th Div. Fairbanks 1938), already quoted above, and which clearly intimated in obiter dicta that AS 19.10.010 would not apply to unsurveyed lands. The federal cases we have found relating to the creation of section lines, while only somewhat analogous, are nonetheless useful in trying to predict how disputes might be resolved concerning the right-of-way issue.

Before discussing these cases, however, we believe it first would be helpful to discuss the origin of protraction diagrams and plats as they relate to the purported creation of unsurveyed "section lines."

A. The origin and nature of protracted "section lines"

As we understand it, the impetus for the

protraction of survey lines in Alaska -- essentially a desk top or paper method of describing land using mathematical calculations without on-the-ground monuments -- occurred in the 1950's when there was a tremendous increase in interest in oil and gas leasing. The history is best described in an unpublished paper (on file at the division of technical services, hereafter "dts") presented in 1960 to the Western Regional Conference of the American Congress on Surveying and Mapping by Lyle Jones, then Chief Cadastral Surveyor in BLM's Juneau Office, 12-14, 17-19:

> As an illustration of projects to meet special needs, oil and gas activity in large areas of unsurveyed public domain land created a problem with which the Bureau had never before been faced. Regulations in effect at that time, required that these offers to lease, for unsurveyed land, be described by metes and bounds and tied to corners of the public land surveys or other monumented points. In Alaska they might even be tied to prominent items of topography or other points marked upon the ground. These regulations may have been adequate for the administration of offers to lease isolated parcels of land, or if such offers covered only a small area. In 1952, however, offers to lease were filed in the Anchorage Land Office in Alaska for a total area of over one million acres in the Yakataga - Katalla area along the Gulf of Alaska. These filings were followed by numerous other filings throughout Alaska, reaching a tremendous peak during 1957 and 1958 that has resulted in approximately 40 million acres now being under offer or lease. Since only 7/10 of one percent of Alaska has been surveyed, practically all of these offers or leases are on unsurveyed land. They all were tied to monumented points and were described by metes and bounds. Few, if any, of these control points had been tied together by field surveys and their exact

geographical position was unknown.

....

An attempt had been made by the applicants to protract the rectangular system surveys out from the existing surveys and by a metes and bounds description, to describe the parcels of land that would be identical to the protracted sections. To facilitate the plotting of these offers, and to more readily determine status, we prepared a diagram showing the protraction of the rectangular system across the unsurveyed areas lying between the segments of original survey work.

....

With the tremendous increase in oil and gas filings in the late 1957 and '58 it became apparent that protraction diagrams would have to be prepared for a major portion of Alaska.

....

These protraction diagrams for Alaska are prepared on a mylar or other permanent type reproducible base. Each sheet or diagram contains 368,640 acres or 16 townships, 4 townships wide and 4 townships long.

....

These diagrams, when the project is completed, will cover most of Alaska and will include approximately 20,000 whole and fractional townships.

Because protraction diagrams were based on a "paper" method of survey, surveyors understood that their accuracy was always "approximate." Interestingly, this fact was acknowledged in the Alaska National Interest Lands Conservation Act of 1980, Pub. L. 96-487, section 909, 94 Stat. 2447, 43 U.S.C. § 1601 note (hereafter "ANILCA") as follows:

> With the agreement of the party to whom a patent is to be issued under this title, or the Alaska Native Claims Settlement Act, the Secretary, in his discretion, may base such patent on protraction diagrams in lieu of field surveys. Any person or corporation receiving a patent under this title or the Alaska Native Claims Settlement Act on the basis of a protraction diagram shall receive any gain or bear any loss of acreage due to errors, if any, in such protraction diagram. (Emphasis supplied.)

Protractions are, thus, most definitely changeable. Indeed, we are told by personnel in the dts that many initial protracted survey lines have already been altered to correct calculation errors or to reflect changes needed when on the ground survey monumentation has actually occurred. A protracted "section line" may, therefore, be positioned on a plat in one place when a plat is initially prepared and filed, re-located on another plat elsewhere by a more accurately calculated protraction later, and re-located yet a third place on a plat after actual survey. Were a protracted "section line" the location of an AS 19.10.010 right-of-way, therefore, the obvious question arises: "Which protraction at what point in time?"

The practical difficulties associated with claiming protracted "section line" rights-of-way do not, unfortunately, end at the time the section line is surveyed on the ground. The

dts has provided us with Alaska State Land Survey (ASLS) Nos. 73-130 and 81-207, which demonstrate how a protracted "section line" moved north about 500 feet when the survey was made on the ground (see copies attached). This "move" prompts many questions. Does the state now have two rights-of-way, or just one? If just one, on the basis of which plat? On which line: the protracted or surveyed section line? What impact does the move have on intervening and subsequent purchasers, who bought land on the basis of ASLS No. 73-130's protracted line, only to find the section line now running, because of later survey, through the middle of their property, and perhaps through the middle of their living room? Dts advises us that a situation like this involving the middle of a recreational cabin has already come to its attention.

We further observe that ASLS No. 73-130's Note #2 states that: "Tracts traversed by the section lines are subject to a 50 foot easement each side of the section line which is reserved to the State of Alaska for public highways under AS 19-.10.010." The note does not say which line, protracted or surveyed. Moreover, state patents to landowners shown on ASLS No. 73-130 only say the patent is "subject to platted easements" -- does this mean the ASLS No. 73-130 protracted easements? Does it mean the "corrected plat," filed as a consequence of a later

survey, ASLS No. 81-207? Ordinarily a subsequent patentee takes subject to a previous R.S. § 2477 right-of-way, whether or not expressly reserved in the patent. State of Alaska v. Alaska Land Title Assoc., 667 P.2d 714, 726 (Alaska 1983), citing Arizona v. Crawford, 441 P.2d 586, 590 (Ariz. App. 1968). However, when a patent refers to an official government survey, the survey becomes part of the conveyancing instruments. U.S. v. Otley, 127 F.2d 988 (9th Cir. 1942). The plat gives notice of the right-of-way, as might publication of a land order in the Federal Register. Alaska Land Title Assoc., 667 P.2d 725-26. If the plat's notice misleads, however, subsequent purchasers may well have an argument that the government is equitably estopped from claiming a right-of-way different than the right-of-way first platted, even though a reservation in neither patent nor plat is necessarily required. 33/ Cf. Leo Sheep Co. v. U.S., 440 U.S. 668,

---

33/ In 1983 Inf. Op. Atty. Gen. (February 1, 1983; 566-104-83) 3, it was opined that state patents need not recite any claimed R.S. § 2477 reservation. The theory is that since state patents are quitclaim deeds, title passes subject to any pre-existing interests, including those created by statutes like AS 19.10.010. See also State of Alaska v. Alaska Land Title Assn., 667 P.2d 714 (Alaska 1983). Accord, Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975). AS 38.95.160, however, requires certain publicly financed roads to be "documented by recorded plat," and AS 40.15.030 indicates that recordation and approval of a subdivision plat dedicates to public use the rights-of-way shown on the plat. Notably, AS 40.15.190(2)(A) excepts state plats from the operation of AS 40.15.030.

687-88 (1979) (rejecting BLM's claim to "common law" public recreation easements across railroad grant lands to reach public lands, the Court unwilling to upset "generations of land patents ... to accommodate some ill-defined power to construct public thoroughfares without compensation."); United States v. Madison, ___ U.S. ___, 53 U.S.L.W. 4433, 4435, n.7 (April 2, 1985) (potential for equitable estoppel against the BLM discussed); Annot. 36 A.L.R. 4th 625 (1985) (discussing when governments are estopped from objecting to the construction of private improvements in unused, dedicated rights-of-way). The problem with protracted "section lines," then, is that as platted they may induce unjustified reliance and mislead unless it is made very clear that they "float" and when monumented on the ground might well result in a corrected plat.

An additional practical problem arising out of protracted "section lines" once they are surveyed concerns the surveyor's allegiance to the rule of "closing corners." "Closing corners" means that boundary lines are not delineated so as to cross and continue beyond each other. It has been consistent surveying practice since the inauguration of the rectangular survey system to require that corners be "closed" at the intersection of the boundary line of one parcel with that of another. For example, the 1833 General Instructions To His Deputies; By

The Surveyor General Of The United States, For The States Of Ohio And Indiana, And The Territory of Michigan (John H. Wood, Printer) reads, 34/:

> Whenever a section or township line intersects a line of a private claim, or Indian reservation, there a corner must be established. The particular line intersected, with its course, the name of the claimant or reserve, with the number or other designation by which it is known, must be noted. And from such intersection, the private claim or reserve line must be carefully measured, each way along said line, to the end thereof, unless it should be intersected by another section or township line before the end be reached. (Emphasis supplied.)

Id. 20. The current Manual of Surveying Instructions 1973, BLM Technical Bulletin 6, § 3-68 -- 3-69, at 79, reads:

> Several types of closing lines have been discussed earlier. Guide meridians are closed against standard parallels as a device to avoid the extreme effect of convergency on the breadth of sections (section 3-14). Township and section lines are closed on standard parallels as a part of the same plan (sections 3-19 and 3-51). Both township and section lines may be made closing lines to maintain rectangularity (sections 3-26 and 3-34). A different type of closing line occurs where the lines of the rectangular system of survey cross or close on the boundaries of reservations or grants, State boundaries, or the lines of various kinds of claims.

---

34 / Reprinted in C. White, A History Of The Rectangular Survey System, (Department of the Interior, 1982), 299.

> 3-69. Closing corners are normally established at intersections with a surveyed reservation, grant, or State boundary. The bearing and the distance to the nearest corner or angle point of the irregular boundary should always be noted. It is usually necessary to retrace the boundary to the nearest corner in each direction to insure placement of the closing corner at the exact intersection. (Emphasis supplied.)

If boundary lines were not closed at their intersections , professional surveyors consider the very purpose of surveying (and mapping) -- establishing distinct, identifiable property lines visually understandable -- to be thwarted.

This principle of surveying identifies a very practical surveyor's problem with the reservation of rights-of-way on protracted "section lines." If the later on the ground survey results in the movement of the platted protracted "section line" to a different platted location (virtually guaranteed in every instance given the approximate nature of protractions), the closing corner principle must be violated, or the right-of-way will be reserved in interrupted parts only. An example can be seen in the attached ASLS No. 73-130 showing the location of the protracted section line, and the location of the section line once actually surveyed.

A final practical problem associated with protracted "section lines" arises out of the fact that most of the Alaska

land mass will remain unsurveyed for decades to come. According to a U.S. General Accounting Office report to the Secretary of the Interior entitled "Alaska Land Conveyance Program -- A Slow Complex, And Costly Process," June 12, 1984 (GAO/RCED-84-14), the vast majority of the exterior boundaries of state and Alaska Native land selections have yet to be surveyed -- indeed, BLM's initial goal is to complete only exterior boundary surveys of Native lands by 1990 and state lands by 2005. Id. 23. Only about one-third of the exterior boundaries of townships in the state had been surveyed as of December 31, 1983, and yet to be surveyed by BLM are literally tens of thousands of allotments, cemetery sites, mineral claims and so forth. Id. 23-24. Section 6(g) of the Statehood Act, Pub. L. 85-508, 72 Stat. 339, requires BLM to survey only the exterior boundaries of lands unsurveyed at the time of their selection by the state. The effect is that it will certainly be many years, perhaps many decades, before most protracted "section lines" are surveyed on the ground. Intervening conveyances with plats showing rights-of-way based on protracted "section lines" will no doubt create reliance interests that would defy easy accommodation years from now.

Aside from the practical administrative problems reliance on protracted "section lines" might create, we believe such reliance would be ill-considered on independent legal grounds as

well.

B. Application of AS 19.10.010 to section lines

Federal case law that is important with respect to the creation of section lines originates in two somewhat interrelated but different contexts.

First, recall that R.S. § 2477 deals with the right-of-way for the construction of highways over "public lands." One should always be cautious about the meaning of "public lands," since so often it depends on the statutory context. However, the United States Supreme Court has said that:

> 'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' Newhall v. Sanger, 92 U.S. 761, 763 (1875).

Barker v. Harvey, 181 U.S. 481, 490 (1900). Lands subject to "sale or other disposal" might not have to surveyed prior to entry, but historically virtually all federal disposal programs have required survey before the creation of rights in federal lands. Section 909 of ANILCA noted previously is a rare exception. Indeed, the 1866 act, of which R.S. § 2477 was section 8,

is ripe with reference to surveys. Thus, the phrase "public lands" has often also been construed to mean "surveyed lands." U.S. v. Northern Pacific Railway Co., 311 U.S. 317, 344 (1940); Jones v. U.S., 195 F.2d 707, 709 (9th Cir. 1952) (Alaska land reservation order at issue); Drygas v. Rhodes, 280 F. 230, 231 (E.D. Ark. 1922). Cf. U.S. v. Morrison, 240 U.S. 192, 213 (1916). In this context, therefore, an R.S. § 2477 right-of-way across "public lands" is a creature of survey.

In the second, interrelated context, the United States Supreme Court has held that a "section" cannot exist until the subject lands are actually surveyed on the ground and the "section" is monumented on the ground. In U.S. v. Northern Pacific Ry. Co., 311 U.S. 317 (1940) a railroad company argued that under an 1864 land grant to its predecessor it became entitled to select "in lieu of" lands away from the railroad right-of-way. By statute these lands were to be odd-numbered "sections." Eventually a dispute arose between the U.S. and the railroad company concerning whether the company had received its full land entitlement. The U.S. argued that the company could have but did not make timely selections of unsurveyed lands, and was therefore now entitled to no additional compensation. The Supreme Court rejected this argument, saying: "Obviously, until surveyed no odd-numbered sections could exist. Unsurveyed lands are not

public lands." 311 U.S. at 344.

Of similar effect is Cox v. Hart, 260 U.S. 427 (1922), a United States Supreme Court decision affirming a Ninth Circuit Court of Appeals ruling involving a tract of land originally surveyed by the U.S. in the mid 1850s. The land was not settled until 1906, after a time when the original survey marks and lines, including the section corners, had disappeared, such that it was impossible to determine with certainty in what section the tract was located. Only unsurveyed land was eligible for entry under the desert land laws applicable at the time, so the question arose whether once surveyed the tract could later take on the character of unsurveyed land, thus being eligible for entry. While noting that Congress had passed legislation in 1909 requiring resurvey of the land, the Supreme Court held that the land was on the date of entry unsurveyed, saying:

> Passing this point, however, it is contended that the lands in question were in fact surveyed. It is true the lands had been surveyed in 1854-1856, but the lines of the survey by the year 1900 had disappeared to such a degree that for practical purposes they had become nonexistent. A survey of public lands does not "ascertain" boundaries; it "creates" them. Robinson v. Forrest, 29 Cal. 317, 325; Sawyer v. Gray, 205 Fed. 160, 163. Hence the running of lines in the field and the laying out and platting of townships, sections and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing the proper land office and all requirements

> as to approval have been complied with, the lands are to be regarded as unsurveyed and not subject to disposal as surveyed lands. United States v. Morrison, 240 U.S. 192, 210; United States v. Curtner, 38 Fed. 1, 10. It follows that although the survey may have been physically made, if it be disapproved by the duly authorized administrative officers the lands which are the subject of the survey are still to be classified as unsurveyed. In other words, to justify the application of the term "surveyed" to a body of public land something is required beyond the completion of the field work and the consequent laying out of the boundaries, and that something is the filing of the plat and the approval of the work of the surveyor. (Emphasis supplied.)

Id. 436. This holding is entirely consistent with the century old purposes of the rectangular survey system for public lands: to create certitude and insure finality in ownership boundaries. It is also consistent with prior federal court cases dealing with the issue, and which the Supreme Court had cited in support of its holding in Cox v. Hart. See, e.g., Sawyer v. Gray, 205 F. 160, 163 (W.D. Wash. 1913) ("The government survey creates, not merely identifies, sections of land."). Cf. U.S. v. Morrison, 240 U.S. 192, 200 (1916) ["(U)ntil the sections were defined by survey and title has vested in the state ... Congress was at liberty to dispose of this (Oregon school grant) land ...."].

It seems logical to argue, therefore, that since survey precedes the creation of "sections", it must precede the creation of "section lines." Clark v. Taylor, 9 Alaska 298, 312 (4th Div. Fairbanks 1938).

Without regard to the logic of the matter, any contrary conclusion would subvert the purposes of the rectangular system of surveys and abscribe a purpose, and legal effect, to protractions never intended by their inventors. Indeed, protractions were initially an attempt at providing some level of certainty when true survey, and therefore certainty, was not possible. It would distort their function to now allow their application to create uncertainty in the language of AS 19.10.010.

It is for these reasons that we tentatively predict a court, particularly a federal court, would find that under AS 19.10.010 a section line must be surveyed before it can become a dedicated right-of-way reserved for public use. If there is to be allegiance to the rectangular survey system, no other option is practically possible, and the legal problems of a contrary view will be unattractive as well. Consequently, for planning purposes it is safer to assume that lands conveyed out of state ownership before survey of section lines are not thereafter subject to AS 19.10.010's automatic right-of-way dedication, although as noted above the state can expressly reserve a floating easement in conveyancing documents that will have the same effect as dedicating an easement on a protracted "section line."

We thus lack confidence in the North Dakota Supreme Court's holding in Faxon v. Lallie Civil Tp., 163 NW 531, 533

(N.D. 1917). That case would if followed in Alaska mean that once AS 19.10.010 was passed in 1923 later surveys retroactively "perfected" rights-of-way under R.S. § 2477 so as to impose them on all territorial land without regard to interim conveyances. Following the logic of Faxon creates conflicts with the rectangular survey system and inevitably forces a confrontation between Congressional power over federal lands in Alaska under U.S. Const. art. IV, sec. 1 (Property Clause) and any asserted state power over those lands, a confrontation the state would face an uphill battle in winning. 35/ Cf. U.S. v. Alaska, 423 F.2d 764 (9th Cir. 1970) cert. denied 400 U.S. 967 (1971) (Presidential withdrawal authority over territorial lands affirmed). While Faxon and other similar state court cases may have been

---

35 / This does not mean to imply that the state has no R.S. § 2477 rights-of-way across federal lands in Alaska. Any number of such rights-of-way have been acquired through state financed and through state and federal financed construction, through user, and through direct federal acknowledgement. Some of them may be on surveyed section lines across federal lands. Our concern here is with the wholesale claim of AS 19.10.010 rights-of-way across protracted "section lines" on all federal lands (including Alaska Native lands held in federal trust and private lands conveyed from the federal government) dating back to 1923 without regard to use, development, or official acknowledgment. Indeed, note that AS 19.10.015's reference to "lands not reserved for public uses" at very least implies support for the proposition that AS 19.10.010 was not intended to retroactively apply so as to impose rights-of-way on unsurveyed state or federally owned land reserved for "public uses" and then subsequently surveyed without any change in the reservation.

appropriate decisions when seen in their limited factual situations, their allegiance to a less than perfect analogy to railroad land grant cases, their lack of discussion of federal statutory developments in this century, and their general failure to come to grips with either the Property Clause or with the historical legislative context of the 1866 act -- "legislation (that) was primitive" 36/ -- all warn against too much reliance on their reasoning in interfacing R.S. § 2477 with AS 19.10.010.

In short, while certainly the question is not free from doubt we do not believe it likely that a modern court will find that as of 1923 AS 19.10.010 had the effect of creating a right-of-way on every unsurveyed "section line" in Alaska such that any post-1923 conveyances were made subject to its "perfection" upon survey without regard to whether on-the-ground survey of the section line had occurred and without regard to the grantor's identity.

## VIII. THE IMPACT OF AS 19.10.010 ON STATE LANDS

### A. General State Lands

If we are correct in arguing that AS 19.10.010 probably

---

36 / Utah Power & Light Co. v. U.S., 243 U.S. 389, 405 (1917).

does not have the effect of dedicating a right-of-way on protracted "section lines" on state owned land, what happens when the land is actually surveyed in sections? Clearly, as soon as the land is surveyed, AS 19.10.010 has the effect of dedicating a right-of-way on the section line. Thereafter if the land is conveyed out of state ownership 37/ and the state chooses to use the section line right-of-way, such as for highway purposes, it is entitled to do so without payment of compensation. The right-of-way is reserved even if the conveyancing documents do not mention it, provided, of course, the right-of-way interest exists before the conveyance occurs. See the authority cited in footnote 33 above.

While in state ownership, tracts of land subject to AS 19.10.010 dedicated section line rights-of-way nonetheless remain subject to all pertinent statutory and regulatory directives concerning management of those lands. In other words, the mere fact that state owned lands have AS 19.10.010 dedicated

---

37/ The director of the division of land and water management (hereafter "dlwm") is required to reserve rights-of-way for the public use in making conveyances of state land into private ownership. AS 38.04.050, 38.04.055, and 38.04.058, and 11 AAC 53.300 et seq. The allocation of regulatory authority between the Department of Transportation and Public Facilities (hereafter "DOT/PF") and other state agencies over R.S. § 2477 rights-of-way on state and non-state land was previously discussed in 1981 Inf. Op. Atty. Gen. (September 14, 1981; A66-404-81).

rights-of-way does not mean that land managers must allow them to be used by the general public without regard to the land's classification. It only means that they are held in trust, protected from abolition except after the public notice associated with vacation procedures, a trust designed to protect their existence so that they can be used and developed if a need for them arises. Their potential for use in the interim must take into account the host of land managerial responsibilities delegated to agencies by the legislature.

A concrete example of a situation where the unrestricted general public use of AS 19.10.010 dedicated section line rights-of-way would be inconsistent with other legislative directives is in the Susitna Flats Game Refuge. See AS 16.20.036. The legislature set aside the refuge to protect fish and wildlife habitat populations and their public uses. AS 16.20.036(b). It specifically directed the Departments of Fish and Game and Natural Resources (hereafter "ADF&G" and "DNR") to establish access corridors to private inholdings through agreements with property owners. AS 16.20.036(f). Obviously implicit in these directives is the assumption that unregulated ingress and egress by the general public might destroy the values the legislature sought to protect. Clearly, therefore, restrictions on use of dedicated section line rights-of-way are permissible. A similar statutory analysis provokes similar conclusions for other state owned lands

that have received special legislative attention [e.g., Tanana Valley State Forest, AS 41.17.400(c)].

With respect to state owned land for which no particular legislative mandate applies, use of the land depends in significant part on its administrative classification. See AS 38.04.065 and 11 AAC 55.070. General "multiple use" lands ordinarily allow for public access without regard to whether it be or a dedicated right-of-way, although "Existing roads and trails shall be used whenever possible." 11 AAC 96.140(2). 11 AAC 96.010(a)(2) also gives the director of the dlwm authority to forbid activities that will harm the land. Similarly, 17 AAC 25.100(a) and 17 AAC 25.110(5) allow the DOT/PF to impose restrictions on the use of a right-of-way when it is necessary to prevent serious damage, or for public safety reasons. DNR also retains the authority, through AS 38.05.850, to charge fees for right-of-way use.

After lands leave state ownership subject to an AS 19.10.010 dedication, the state customarily has asserted control over the rights-of-way only when needed for roads or other public purposes. In the meantime general public use of the rights-of-way has been allowed, with disputes between users and the landowners litigated without state intervention. See, e.g., Anderson v. Edwards, 625 P.2d 282 (Alaska 1981) (private use of an AS 19.10.010 right-of-way restricted to that which is

"reasonable"). This situation may seem somewhat odd given our conclusion that while the land is in state ownership the responsible state agency may restrict -- if necessary, prevent -- a right-of-way's use. However, after the land leaves state ownership the state's interest in the land as such, as opposed to the right-of-way, ends. Nonetheless, the state could choose at any time to intervene to assert and protect its right-of-way interest as the need might arise.

B. State Park Lands

If we are correct in our conclusion that AS 19.10.010 probably does not result in the dedication of rights-of-way on protracted "section lines", lands in the state park system are well protected from incompatible section line use, there being little land within the system that is surveyed. Moreover, much of what we have said with respect to state regulatory power over multiple use lands applies to park lands as well.

Even were the foregoing incorrect, however, there is another independent legal reason why AS 19.10.010 would pose no management problem for lands within the state park system. With two exceptions, all statutes placing state lands within the park system cite the Alaska Const. art. VIII, sec. 7 as authority for

the legislature's action. 38/ This constitutional provision allows the legislature to withdraw lands from the state "public domain." In the two exceptions the legislature nonetheless expressly closed the park units to multiple purpose use. 39/ In Inf. Op. Atty. Gen. (February 21, 1985; 166-136-85), 9-10, it was opined that "Areas removed from the public domain are not subject to the general state laws concerning management and disposal of state land contained in Title 38." With respect to the two exceptions only closed to multiple purpose use -- the Nancy Lake Recreation Area and Chena River Recreation Area -- the opinion concluded that "Areas classified by the legislature for use solely as a public park are closed to the operation of the state's general land disposal laws contained in Title 38." Id. 12. Thus, lands legislatively dedicated to the state park system are not subject to AS 38, which gives dlwm authority to regulate

---

38/ The following statutes cite article VIII, section 7 of the Alaska Constitution as authority for the legislature's action in establishing the pertinent park system unit: AS 41.21.110 (Chilkat State Park); AS 41.21.120 (Chugach State Park); AS 41.21.130 (Kachemak Bay State Park); AS 41.21.150 (Denali State Park); AS 41.21.160 (Wood-Tikchik State Park); AS 41.21.300 (Alaska Marine Parks); AS 42.21.410 (Captain Cook State Recreation Area); AS 41.21.430 (Caines Head State Recreation Area); AS 41.21.610 (Alaska Chilkat Bald Eagle Preserve); AS 41.21.170 (Shuyak Island State Park); and AS 41.51.504(b) (Kenai River Special Management Area).

39/ AS 41.21.450 (Nancy Lake Recreation Area); AS 41.21.470 (Chena River Recreation Area).

state lands and to grant rights-of-way across them, and which generally requires that state land be open for multiple purpose use.

The withdrawal of state park lands from the public domain under the Alaska Const., art. VIII, Section 7 and their closure to multiple purpose use, subject to valid existing rights, argues with equal force against any automatic application of AS 19.10.010 to state park lands. To the contrary, AS 19.05.110 40/

clearly implies legislative recognition that lands needed for public highways may already be "held for another public use", and

---

40/ AS 19.05.110 reads in part:

> When property, which is devoted to or held for another public use for which the power of eminent domain may be exercised, is taken for highway purposes, the department (of transportation and public facilities) may, with the consent of the person or agency in charge of the other public use, condemn the real property to be exchanged for the real property so taken. This section does not limit the authorization of the department to acquire, other than by condemnation, property for that purpose in any other manner. (Emphasis supplied.)

consequently the statute gives the DOT/PF authority to acquire public lands managed by another state agency. See also, AS 19.05.080, 19.05.120. The same clear implication arises from the language of AS 19.10.015(a). 41/

These tacit statutory restrictions on the application of AS 19.10.010 to state parks jibe well with the concept that the statutory dedication of a right-of-way across state owned lands does not restrict state power to later reserve the same state lands for purposes that might be inconsistent with development and use of the reserved right-of-way. See McRose v. Bottyer, 22 P. 393, 394 (Cal. 1889). At the very least, placing state lands within the management purview of the state division of parks and outdoor recreation (hereafter "dpor"), with its specialized statutory powers and mandates under AS 41.21, evidences strong legislative intent that the public use and access across these lands may be tightly controlled by the division so as to insure the park unit is protected. Thus, without regard to what

---

41/ Sec. 19.10.015(a) reads in pertinent part:

> It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet. (Emphasis supplied.)

may be the correct meaning of AS 19.10.010, the dpor has adequate authority under AS 41.21 to adopt regulations controlling access to and across lands within its control. Cf. 11 AAC 96 (land use regulations under AS 38.05).

## IX. CONCLUSION

We thus conclude, somewhat tentatively, that AS 19.10-.010 rights-of-way do not arise until survey occurs. If state owned land is conveyed before section line survey occurs, we would suggest the safer course is not to rely on AS 19.10.010 alone in preserving public access routes. If a section line easement is desired, it is a simple matter to include language in the conveyancing documents to the effect that the state reserves an easement (of whatever needed width) across the land, the center of which will be the section line when surveyed, and which in the interim is a protracted line the location of which builders should only rely upon at their own risk. Comparable language, and notice, used in previous state land disposals may well have been adequate to make grantees aware of the state's intent to reserve such rights-of-way; thus we do not mean to express an opinion that could be read as one finding legally insufficient previous department practices.

We note finally that footnote 15 of 7 Attorney General Opinion 7 (December 18, 1969), without citation or discussion of relevant authority, asserted that:

> The Alaska statutes apply to each section line in the state. Thus, where protracted surveys have been approved, and the effective date thereof published in the Federal Register, then a section line right-of-way attaches to the protracted section line subject to subsequent conformation with the official public land survey.

To the effect that statement is inconsistent with this opinion, it is overruled. 42/

Sincerely yours,

Harold M. Brown

Attorney General

HMB:MJF:cai

---

42/ It is worth noting that in a May 21, 1980 Memorandum to the Acting Area Director of the Bureau of Indian Affairs in Juneau, the Anchorage Office of the Solicitor, U.S. Department of the Interior also rejected the conclusion in the 1969 Attorney General Opinion, saying:

> The (1969 Alaska) Attorney General (Opinion) also concluded that the R.S. 2477 grant attaches on the date the "protracted surveys" were published in the Federal Register. We do not agree with this position; as a practical matter, the protraction diagrams are not a reliable means of ascertaining the correct position of the surveyed section line.

David S. Case Memorandum, 8 n.5.